FILED

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No. 03-

IN THE

Supreme Court of the United States

JEAN BENNETT ROANE,

Petitioner,

v.

NATIONAL CHILDREN'S CENTER, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The District of Columbia Circuit affirmed, without analysis or comment, the district court's Order of dismissed with prejudice of Petitioner's re-filed Complaint. All claims are barred by the Statute of Limitations.

Petitioner challenges, inter alia, (a) appealability under 28 U.S.C. § 1291 and Federal Rules of Civil Procedure 54(b) certification where the district court failed to resolve all claims against all parties in "consolidated" cases and ignored District of Columbia Circuit's prior Mandated Order to issue 54(b) certification, (b) whether Order of "dismissed without prejudice" is a judgment on the merits as a matter of law and (c) whether failure to invoke Federal Equitable tolling of the Statute of Limitations where district court delayed issuance of Order 2 months after the Statute expired.

The District of Columbia Circuit's decision conflicts not only with the Supreme Court and all Circuit courts, but with itself; setting aside decades of well-settled precedent and stable law. The total disregard for these fundamental legal principles presents monumental issues justifying immediate Supreme Court review.

Five questions are presented.

1. Under 28 U.S.C. § 1291 and the Federal Rules of Civil Procedure 54(b) which requires certification where the district court decides fewer than all claims against all parties in these consolidated cases, does "clarification" in response to Respondent NCC's motion to correct what "seems to be a typographical error" supersede the 54(b) requirement, rendering the cases final and appealable?

2. Where the district court delayed issuance of "clarification" Order of "dismissed without prejudice" 2 months after the Statute of Limitations expired, and Petitioner had no legal right to pursue any claims before 54(b) certification was issued, are all claims barred by the Statute of Limitations or, should Federal equitable tolling of the statute be invoked to protect Petitioner from harsh result through no fault of her own, but due solely to failure of district court to respond appropriately prior to the expiration of the Statute of Limitations.

3. Whether Order of "dismissed without prejudice" is a judgment on the merits as a matter of law and appealable? And where Petitioner did not appeal, are all rights either waived or lost?

   (a) Whether Petitioner has a right to file subsequent suit based on the same parties and same facts?

   (b) Whether claims are subject to "res judicata"

4. Where Order of "dismissed without prejudice" in 42 U.S.C. § 1985(3), Civil Rights Conspiracy claim, designating only Corporate Conspirators is legally insufficient and fails as a matter of law under the prevailing intra-corporate conspiracy theory where, if none of the alleged conspirators are persons falling outside the corporate umbrella, conspiracy fails as a matter of law; whether Petitioner's reinstatement of all [Respondents] in re-filed complaint is permissible?

5. Whether failure to invoke sanctions under the Doctrine of Clean Hands where factual proof is clear, convincing and undisputed represents an extreme departure from the accepted and usual course of judicial proceedings?

LIST OF PARTIES

The following parties appeared below in 02:CV01125:

Appellees/Respondents

* National Children's Center, Inc.
Michael F. Dennis, President of Board of Directors
Members of the Board of Directors (11)
Arthur Ginsberg
Dale Dangremond

* Young, Goldman & Van Beek
H. Alan Young, Esq.

* Arter & Hadden LLP
David Shaffer, Esq.
Karen R. Esser, Esq.

* Alpha Associates, Inc.
Nicholas T. Sangalis, President
John Mitchell

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OPINION BELOW

The Order of the United States Court of Appeals For The District of Columbia Circuit was rendered on November 25, 2003, without an Opinion, Appendix A. The District of Columbia Circuit affirmed the April 1, 2003 decision of the United States District Court For The District of Columbia, Appendix B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Federal Rules of Civil Procedure 54(b)

> Judgment Upon Multiple Claims or Involving Multiple Parties.
>
> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights

and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Title 28 United States Code, Section 1291

Final decisions of district courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in Sections 1292(c) and (d) and 1295 of this title.

Title 42 United States Code, Section 1985(3)

Civil Rights Conspiracy.

Depriving persons of rights or privileges if two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws,

> or of equal privileges and immunities under the laws . . . , if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

Jean Bennett Roane ("Petitioner") is an African-American who was employed in the past by Alpha Associates, Inc. ("Alpha"), a Management Consulting firm located in Bloomington, Minnesota. Nicholas T. Sangalis ("Sangalis") is President of Alpha. Petitioner maintained a relationship with Alpha whereby she was offered assignments to function as a Senior Associate Consultant for their Management clients.

On October 6, 1998 Sangalis offered Petitioner an assignment at the National Children's Center, Inc. ("NCC") located in Washington, D.C. NCC is a non-profit agency that provides educational, social and clinical services to persons with developmental disabilities. Sangalis told Petitioner that African Americans represented approximately 93% of NCC employees. A majority of them appeared to be aggrieved to the extent of authorizing a union to file a Petition in the National Labor Relations Board for an election to determine who should be the collective bargaining agent for certain unit employees. Sangalis advised that NCC's Managers and

Supervisors needed training to make certain that laws under the National Labor Relations Act were observed during the campaign. Moreover, training was needed to address issues of race discrimination raised by African-Americans.

On October 16, 1998 Petitioner began her assignment at NCC. She was joined by John Mitchell, a Senior Associate Consultant employed by Alpha. Training sessions and interviews with Managers and Supervisors were held daily. Arthur Ginsberg, Executive Director held staff meetings weekly. At that time, there were discussions about the need for on-going Training. Mr. Ginsberg announced he would request that the NCC Board of Directors approve a budget for Training Consultants. It was approved. The positions were to be filled after the election. Petitioner is a fully qualified Training Consultant; graduate of Howard University and the University of Virginia, School of Law.

On December 16, 1998 NCC employees voted against the union and Petitioner's assignment ended. Accordingly, beginning in January, 1999 Petitioner applied for one of the Training positions. She sent 4 letters of inquiry accompanied by a proposal. NCC never responded. In the interim, Petitioner was advised by employees that Dale Dangremond, then a sub-contractor Consultant was presenting Training sessions and although fully compensated received an additional salary from the budget approved by the NCC Board of Directors. Petitioner complained to NCC about refusing to respond to her application for employment as a Training Consultant. She called Mr. Ginsberg on 4 occasions and left voice mail messages. At no time did she receive a response. NCC initiated a campaign to stop Petitioner from complaining about racial discrimination against herself and to cease all contact with NCC employees.

On February 25, 1999 NCC in concert with other Defendants filed an Application for a Temporary Restraining Order and Preliminary Injunction in United States District Court For The District of Columbia. They alleged, *inter alia*, Petitioner continued to complain about racial discrimination and the Temporary Restraining Order was necessary to make certain that she cease and desist all conduct and contact.[1] The district court denied the application and thereafter, NCC published throughout NCC and the surrounding community that Petitioner "is crazy."[2]

Petitioner filed her Complaint in the United States District Court For the District of Columbia on December 14, 1999.[3] A claim of Race Discrimination and Retaliation was alleged. The Complaint was amended to include a claim of Civil Rights Conspiracy. On February 25, 2000 Petitioner filed a second Complaint. A claim of Defamation and Civil Conspiracy was alleged. Respondents filed their Motions to Dismiss under Federal Rules of Civil Procedure 12(b)(6). The district court entered its Order and Judgment on March 29, 2001 dismissing all claims with prejudice against [Defendants] other than NCC. The 42 U.S.C. § 1981 claim against NCC and the 42 U.S.C. § 1985(3) claim against all NCC [Defendants] was dismissed without prejudice. Appendix E.

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1. The right to complain about race discrimination is protected under 42 U.S.C. § 1981.

2. NCC does not deny the statement, explains it is their opinion.

3. Petitioner filed a charge in the Equal Employment Opportunity Commission on or about March 29, 1999; requested a Right-to-Sue letter – without investigation or interview with Petitioner, EEOC dismissed the charge.

Petitioner filed a Notice of Appeal on April 18, 2001. The District of Columbia Circuit's decision was entered on October 15, 2001. The Appeal was dismissed because Respondents did not resolve all claims against all parties in the consolidated cases and did not issue Federal Rules of Civil Procedure 54(b) certification; and did not dispose of the 42 U.S.C. § 1981 claim against NCC. Appendix D.

On March 27, 2002, the district court issued an Order, "Upon consideration of the Motion for Clarification . . . ," amending the court's March 29, 2001 Order and Memorandum Opinion to reflect that [Plaintiff's] 42 U.S.C. § 1981 claim stands dismissed without prejudice against NCC and 42 U.S.C. § 1985(3) claims stands dismissed without prejudice with respect to all NCC [Defendants].[4] Appendix C.

In response to the Order of "dismissed without prejudice", Petitioner re-filed Complaint as noted therein. Respondents filed Motions to dismiss. On April 2, 2003 district court entered its Order and Memorandum Opinion denying all claims on the basis they are barred by the Statute of Limitations,[5] Appendix B. On April 30, 2003 Petitioner filed a Notice of Appeal. On November 25, 2003 District of Columbia Circuit denied Petitioner's appeal in every respect and affirmed the district court's decision in an Order without an opinion or comment, Appendix A.

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4. District Court failed to comply with District of Columbia Circuit Mandated Order for 54(b) certification dated October 15, 2001. The defect remains to date.

5. On January 15, 2002 the Statute of Limitations expired. On March 27, 2002 district court issued Order for "clarification." (more than 2 months after the statute expired). On June 6, 2002 Petitioner re-filed Complaint. Approximately 2 months and 1 week later.

REASONS FOR GRANTING THE PETITION

When it rendered its decision in this case, the District of Columbia Circuit had the benefit of, but disregarded its own prior Order of October 15, 2001 in which the district court was mandated to issue Federal Rules of Civil Procedure 54(b) certification because all claims against all parties in these consolidated cases[6] had not been resolved. Within the Order the District of Columbia Circuit cited controlling precedent, *Building Indus. Ass'n v. Babbitt*, 161 F.3d 740, 742-43 (D.C. Cir. 1998).

The District of Columbia Circuit stands alone in this Court and all Circuit courts in affirming the district court's failure to comply with its Mandated Order. There are no cases reported in support of the decision. Left undisturbed, the plain language of 54(b) is nullified by the district court's Order of "dismissed without prejudice" in 42 U.S.C. § 1981 and 42 U.S.C. § 1985(3) which clearly states is a response to consideration for a Motion by Respondents to clarify "what appears to be a typographical error" Thus, the race discrimination and civil rights statutes' effectiveness in this case and others is impaired-to obliteration. And as here, Petitioner's claims are disposed of by a Statute of Limitations bar where the statute is a compelling non-issue.

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6. District court asserted "This action was taken because the factual background of both cases was *identical*, and because the motion to consolidate was unopposed." Memorandum Opinion 3/29/01 @ p. 2. Record reveals Petitioner's opposition in part, "The court has consolidated the two cases arising out of the fact that they are *related* causes of action . . . , wherefore, [Plaintiff] requests that [Defendants'] motions to consolidate trials be denied in all respects." Status Memorandum 10/10/00 @ p. 20.

Review by this Court also is necessary to address five additional important issues posed by the District of Columbia Circuit's decision. First, notwithstanding that Federal Rules of Civil Procedure 54(b) certification is mandatory and the "order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties" is dispositive of the issue, the district court's offer that clarification (to correct a typographical error) resolves the finality issue raised by [the court of appeals] is unsupported by all circuit courts. Most recently, in *Feliciano et al. v. Rullan*, 303 F.3d 1 (2002) the court held that clarification does not render a case appealable for any purpose. If left undisturbed, Petitioner's rights are lost because district court asserted and District of Columbia Circuit confirmed that she did not appeal.

Second, the issue of an Order of "dismissed without prejudice" represents a judgment on the merits as a matter of law and where Petitioner did not appeal, all rights were either waived or lost. District of Columbia Circuit stands alone in this case and in conflict with the District of Columbia Circuit and all Circuits where a dismissal without prejudice is not a judgment on the merits. The case law is not overwhelming because the principle is an established precedent that does not require litigation. In all jurisdictions, "dismissed without prejudice" means the right of the complainant to sue again on the same cause of action. The effect of the words "without prejudice" is to prevent the decree of dismissal from operating as a bar to a subsequent suit, *Northrup v. Jay*, 262 Mich. 463 (1933). When an action is dismissed without prejudice it is meant as a declaration that no rights or privileges of the party affected are to be considered waived or lost, *Link v. Wabash Railroad Co.*,

370 U.S. 626 (1962) which this court, noted "Since the order of dismissal here did not specify that it was without prejudice . . . , the dismissal operates as judgment on the merits."

Third, review is necessary to examine the application of the Statute of Limitations in these cases where the district court withheld District of Columbia Circuit's Mandated Order for 54(b) Certification and the Statute of Limitations expired on January 15, 2002 – and district court issued Order for "clarification" of dismissed without prejudice on March 27, 2002, more than 2 months after the Statute expired, in effect lulling Petitioner into re-filing Complaint on June 6, 2002. Notwithstanding the validity of the 54(b) requirement, Petitioner's claims should have been subject to the Federal Equitable tolling of the statute under *Phillips v. Heine*, 984 F.2d 489 (1993). District of Columbia Circuit's position is irreconcilable since this case was cited in its Order of October 15, 2001. There appears to be a conflict that needs to be resolved. *See also York & York Construction Company v. Alexander*, 296 A.2d 710 (1972).

Fourth, a review is warranted of the District of Columbia Circuit's acceptance of the district court's Order, "dismissed without prejudice" in 42 U.S.C. § 1985(3) claim against all NCC [Defendants]. While there have been differences viewed by some jurisdictions, the prevailing view suggests that conspiracy in violation of 42 U.S.C. § 1985(3) is precluded as a matter of law if none of the alleged conspirators are persons falling outside of the corporate umbrella, *Girard v. 94th Street & Fifth Ave. Corp.*, (1976, CA2NY), *Cole v. University of Hartford*, (1975, DC Conn) 391 F. Supp. 888. The question is whether the Order is legally sufficient on its face and fails as a matter of law, cured by the reinstatement of all [Defendants] in Petitioner's re-filed Complaint.

Fifth, review is warranted where District of Columbia Circuit denied Petitioner's Motion to invoke the Doctrine of Clean Hands where the misconduct is clear, convincing and undisputed. *See Leo Feist, Inc. v. Young*, 46 F. Supp. (1942), *reversed on other grounds*, 138 F.2d 972 (1973) *Bell & Howell Co. v. Bliss*, 262 F. 131 at 134.

Thus, certiorari is warranted to eliminate the possibility that the result is repeated in the district court and District of Columbia Circuit.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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Petitioner Pro Se

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT FILED NOVEMBER 25, 2003

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 03-7056

September Term, 2003
02cv01125

Jean Bennett Roane,

Appellant

v.

National Children's Center, Inc., et al.,

Appellees

BEFORE: Henderson, Randolph, and Tatel, Circuit Judges

ORDER

Upon consideration of the motions for summary affirmance and the oppositions thereto; the motion for leave to file a reply out of time, the lodged reply, and the opposition to the motion for leave to file; the motion to amend pleadings to assert a claim of fraud, the opposition thereto, and the reply; the motions for sanctions and the opposition thereto; the motion to expedite, the opposition thereto, and the reply; and the motion to suspend rules to expedite decision for good cause, the oppositions thereto, and the reply, it is

Appendix A

ORDERED that the motion for leave to amend pleadings to assert a claim of fraud be denied. It is

FURTHER ORDERED that the motion for leave to file a reply out of time be granted. The Clerk is directed to file the lodged reply. It is

FURTHER ORDERED that the motions for summary affirmance be granted and that the dismissal of all of the claims in appellant's June 2002 complaint be summarily affirmed. Appellant's claims against all defendants other than the National Children's Center defendants are barred by the doctrine of res judicata, and her claims against the National Children's Center defendants are barred by the statute of limitations. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). It is

FURTHER ORDERED that the motions for sanctions be denied. It is

FURTHER ORDERED that the motion to suspend rules be denied. It is

FURTHER ORDERED that the motion to expedite be dismissed as moot.

Appendix A

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam
s/ [illegible]

APPENDIX B — MEMORANDUM OPINION AND ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND FILED APRIL 2, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 02-1125 (RCL)

JEAN BENNETT ROANE,

Plaintiff

v.

NATIONAL CHILDREN'S CENTER, INC., ET AL.,

Defendants

MEMORANDUM OPINION

Pending before this Court are defendants' Motions for Dismissal and plaintiff Jean Bennett Roane's Motion for Summary Judgment. After a careful review of the motions, the applicable law, and the record in this case, the Court finds that defendants' Motions for Dismissal should be GRANTED, and plaintiff's Motion for Summary Judgment should be DENIED.

Appendix B

BACKGROUND

Ms. Roane's initial complaint in this matter was filed pro se on December 20, 1999, and was assigned Civil Action No. 99-3390. In this complaint, Ms. Roane alleged that she was unlawfully discriminated against based on her race, and retaliated against for exercising her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*; and 42 U.S.C. § 1981. These alleged wrongs revolved around Ms. Roane's submission of an application for employment with the National Children's Center (NCC) for the position of Training Consultant. (*See* 1999 Complaint, at 4).

There were four sets of defendants named in this initial suit. The first set was comprised of defendants affiliated with the NCC: the NCC itself, the Board of Directors of the NCC, Executive Director Arthur Ginsburg, and Chief Program Officer Dale Dangremond (NCC defendants). (*See* Memorandum Opinion 3/29/01, at 2). The second set was made up of Alpha Associates, the President of Alpha Associates Nicholas T. Sangalis, and John Mitchell (Alpha defendants), who were supervisors and employers of Ms. Roane when she worked at Alpha. (*Id.*) Third, the law firm of Arter & Hadden, David Shaffer, and Karen Esser (Arter & Hadden defendants), who represented the NCC during the union organizing campaign and in the TRO hearing. (*Id.*) Finally, Ms. Roane also named H. Alan Young as a defendant. Mr. Young was with the law firm of Young, Goldman & Van Beek and served as general counsel to NCC on a contract basis. (*Id.*)

Appendix B

On March 1, 2000, Ms. Roane, proceeding pro se, filed a second complaint against NCC and many of the defendants already named in the initial complaint. This complaint was assigned Civil Action No. 00-436. In this suit, Ms. Roane alleged that she was defamed by an attorney with Arter & Hadden during the hearing on the TRO on February 25, 1999. Further, Ms. Roane alleged that she was slandered by statements made by two of the NCC defendants, Dale Dangremond and Arthur Ginsburg, at the NCC to the effect that Ms. Roane was "crazy." (2000 Complaint ¶¶ 13-14, *see also* Memorandum Opinion 3/29/01, at 2-3).

The two cases above, originating from the 1999 Complaint and the 2000 Complaint, were consolidated by the Court. This action was taken because the factual background of both cases was identical, and because the motion to consolidate was unopposed. (Memorandum Opinion 3/29/2001, at 3). Overall, Ms. Roane sued for violations of Title VII, 42 U.S.C. §§ 2000e *et seq.*; 42 U.S.C. § 1981; 42 U.S.C. § 1983; 42 U.S.C. 1985; and slander per se.

On March 29, 2001, the Court entered a Judgment, Order, and Memorandum Opinion in which the Court dismissed almost all of Ms. Roane's claims. Of the claims dismissed, the great majority were dismissed with prejudice. However, some of the claims were dismissed without prejudice. (*See* Memorandum Opinion 3/29/01, at 16).

Ms. Roane filed a Notice of Appeal on April 25, 2001. On October 15, 2001, the Court of Appeals dismissed Ms. Roane's appeal because all claims in the case had not yet been resolved. The Court of Appeals' decision was based

on the conclusion that this Court had left in place Ms. Roane's 42 U.S.C. § 1981 claim against NCC, and because this Court had not issued a certification pursuant to FED. R. CIV. P. 54(b) permitting an appeal of the other claims.

On March 27, 2002, the Court clarified its Order of March 29, 2001, indicating that Ms. Roane's 42 U.S.C. § 1981 claim against NCC and her 42 U.S.C. § 1985 claim against all NCC defendants stood dismissed without prejudice because of improper service. (*See* Order 3/27/02). The Court's clarification addressed the question of finality raised by the Court of Appeals, rendering the case final and appealable. Ms. Roane did not appeal.

On June 6, 2002, Ms. Roane, proceeding pro se, filed the complaint that forms the basis of the case at bar. In this complaint, Ms. Roane alleges that she is the victim of employment discrimination. (2002 Complaint 7-8). The facts, issues, and evidence in the instant case are based on identical claims that were considered and resolved by this Court in Civil Action No. 993390 (consolidated). This fact is conceded by Ms. Roane in her Motion for Summary Judgment. (*See* Plaintiff's Motion for Summary Judgment and Memorandum in Support Thereof 1/2/03, at 2).

Appendix B

ANALYSIS

I. The Legal Standard

Under FED. R. CIV. P. 12(b)(6), dismissal is appropriate where a defendant has "shown beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1955). In deciding a motion to dismiss, the Court must accept all well-pleaded factual allegations as true, and draw all reasonable inferences in favor of the plaintiff. *See Fitts v. Federal Nat'l Mortgage Assn*, 44 F. Supp. 2d 317, 321 (D.D.C. 1999). However, the Court need not accept the plaintiff's legal conclusions as true. *See Artis v. Greenspan*, 158 F.3d 1301, 1306 (D.C. Cir. 1998).

The court may dismiss a complaint for failure to state a claim if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Atchinson v. District of Columbia*, 73 F.3d 418, 422 (D.C. Cir. 1996). Also, the court will grant dismissal under Rule 12(b)(6) where the face of the complaint reveals obvious, "built-in" affirmative defenses. *Garrett v. Commonwealth Mortgage Corp.*, 938 F.2d 591 (5th Cir. 1991). The court views pro se pleadings with considerable liberality and holds such pleadings to less stringent standards than those applied to pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Thus, a pro se complaint should not be dismissed unless the plaintiff cannot prove any facts to support her claim. *Schowers v. Graham*, 1990 U.S. Dist. LEXIS 13748 (D.D.C. 1990).

Appendix B

II. The Doctrine of Res Judicata Precludes Further Litigation on Ms. Roane's Claims With Respect to All Defendants Except for Ms. Roane's § 1981 Claim Against NCC and § 1985 Claim Against All NCC Defendants

A. The Legal Standard for Res Judicata

Also known as "claim preclusion," the doctrine of res judicata holds that "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Drake v. FAA*, 291 F.3d 59, 66 (D.C. Cir. 2002) (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979)). Whether two cases implicate an identical cause of action turns on whether they share the same nucleus of facts. *Id.* (citing *Page v. United States*, 729 F.2d 818, 820 (D.C. Cir. 1984)). Under res judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Id.* (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). Res judicata ensures

> the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals.

Nevada v. United States, 463 U.S. 110, 129 (1983) (quoting *Southern P. R. Co. v. United States*, 168 U.S. 1, 49 (1897)).

Appendix B

The three elements of res judicata are: (1) a final judgment on the merits in the first action; (2) the present claim is the same as a claim that was raised or that might have been raised in the first proceeding; and (3) the party against whom res judicata is asserted was a party or in privity with a party in the previous case. *Jacobsen v. Oliver*, 201 F. Supp. 2d 93, 102-103 (D.C. Cir. 2002) (citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

B. Res Judicata Applied

In the case at bar, Ms. Roane's claims must be barred because the requirements of the doctrine of res judicata, as stated above, are satisfied.

1. There Was a Final Judgment on the Merits in the First Action

A judgement on the merits was entered in Civil Action No. 99-3390 (consolidated) on March 29, 2001. This judgment was clarified on March 27, 2002, indicating that Ms. Roane's "42 U.S.C. § 1981 claim stands dismissed without prejudice with respect to NCC," and her "42 U.S.C. § 1985 claim stands dismissed without prejudice with respect to all NCC Defendants." (Order 3/27/02). This clarification addressed the question of finality raised by the Court of Appeals, rendering the case final and appealable. Ms. Roane did not appeal. Therefore, the first requirement of res judicata is met.

Appendix B

2. Ms. Roane's Present Claims are the Same as Those Which Were Raised or Which Might Have Been Raised in the Prior Proceeding

Ms. Roane's present claims, as stated in the 2002 Complaint, are identical to the claims raised in Civil Action No. 99-3390 (consolidated). This fact is openly conceded by Ms. Roane who states that the 2002 Complaint "represents the re-filed Complaint in Case Number 99:CV03390." (Plaintiff's Motion for Summary Judgment and Memorandum in Support Thereof 1/2/03, at 2). Therefore, the second requirement of res judicata is met.

3. Ms. Roane and the Defendants Were Parties in the Previous Proceeding

Finally, the defendants in the case at bar are identical to the defendants in Civil Action No. 99-3390 (consolidated). This is evident from an examination of the complaints at issue. *See* 2002 Complaint; 2000 Complaint; 1999 Complaint). Therefore, the third and final requirement of res judicata is met.

It appears that Ms. Roane has misunderstood the Court's Order of March 27, 2002 in Civil Action No. 99-3390. This misunderstanding is evident from the fact that Ms. Roane stated that ". . . the Court *reversed* a dismissal with prejudice which arose, in part out of defects in service which have been cured . . ." (emphasis added) (Plaintiff's Motion for Summary Judgment and Memorandum in Support Thereof 1/2/03, at 3). The Court notes that although Ms. Roane is proceeding pro se, she has stated that she received a Juris

Doctor from the University of Virginia School of Law, and is a cum laude graduate of Howard University. (2002 Complaint at 5; 2000 Complaint ¶ 52). Notwithstanding this fact, it appears evident from Ms. Roane's actions, that she has erroneously construed the March 27, 2002 Order to mean that she may refile her entire case against all defendants from the earlier suit. This is plainly and demonstrably wrong. Accordingly, based on the doctrine of res judicata, Ms. Roane's claims - as stated in the 2002 Complaint - are barred with respect to all defendants except for Ms. Roane's § 1981 Claim Against NCC and her § 1985 Claim against all NCC Defendants.

III. The Applicable Statute of Limitations Bars Ms. Roane's § 1981 Claim Against NCC and § 1985 Claim Against All NCC Defendants

Ms. Roane's allegations of employment discrimination are barred because more than three years have passed since the complained of actions occurred and the filing of the instant complaint. In the District of Columbia, claims filed pursuant to § 1981 and § 1985 must be brought within three years. *See* D.C. Code Ann. § 12-301(8) (2002). *See also Carney v. American University*, 151 F.3d 1090, 1096 (D.C. Cir. 1998) (applying D.C.'s personal injury statute of limitations to § 1981 claim); *Zandford v. NASD*, 30 F.Supp.2d 1, 21 (D.C. Cir. 1998) (citing *Hobson v. Wilson*, 737 F.2d 1, 32 (D.C. Cir. 1994) (42 U.S.C. § 1985 claim is subject to a three year statute of limitations)).

In the instant case, none of the acts Ms. Roane complains of occurred within the three year statute of limitations period.

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Ms. Roane filed the instant complaint on June 6, 2002. Accordingly, all allegedly discriminatory acts must have taken place at some time on or after June 6, 1999. On the face of Plaintiff's Complaint, all of the allegedly discriminatory actions occurred before June 6, 1999. For example, (1) Mr. Ginsburg's failure to respond to Ms. Roane's repeated attempts to apply for the alleged Training Consultant position occurred in December 1998 and January 1999 (2002 Complaint at 8, ¶¶ 17-18); (2) Ms. Roane knew of and complained about race discrimination to Mr. Ginsberg prior to February 22, 1999 (2002 Complaint at 8); (3) the TRO hearing that forms the basis for Ms. Roane's retaliation and conspiracy claims occurred on February 25, 1999 (2002 Complaint at 11-13, ¶¶ 28-42).

The filing of Ms. Roane's original suit in Civil Action No. 99-3390 (consolidated), which was subsequently dismissed, did not toll the statute of limitations during the time it was pending. *See Dupree v. Jefferson*, 666 F.2d 606, 610-11 (D.C. Cir. 1981); *Sayyad v. Fawzi*, 674 A.2d 905, 906 (D.C. 1996). The Court notes that the Supreme Court has instructed the federal courts to borrow state law tolling rules in the absence of a federal rule to calculate the appropriate limitation period under the federal civil rights statutes, so long as those rules are not inconsistent with federal policies. *See Wilson v. Garcia*, 471 U.S. 261 (1985); *Chardon v. Fumero Soto*, 462 U.S. 650, 655-56. Therefore, under District of Columbia law, a statute of limitations is not tolled when an earlier complaint based on the same factual allegations is involuntarily dismissed without prejudice. *Dupree supra*.

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Ms. Roane's analysis of tolling to the contrary as stated in her in her Reply Memorandum is flawed. (*See* Reply Memorandum to All Defendants 11/29/02, at 18-19). Specifically, the Court did not grant Ms. Roane a "remedy" in its Order dated March 27, 2002 so that she might refile her claims against all defendants from the prior suits. (*See* Order 3/27/02; *see also* Reply Memorandum to All Defendants 11/29/02, at 19). The March 27, 2002 Order served only to clarify the Court's Memorandum Opinion dated March 29, 2001. The March 27, 2002 Order stated that Ms. Roane's "42 U.S.C. § 1981 claim stands dismissed without prejudice with respect to NCC," and her "42 U.S.C. § 1985 claim stands dismissed without prejudice with respect to all NCC Defendants." (Order 3/27/2002). These claims, as originally expressed in the March 29, 2001 Memorandum Opinion, were not pursued by Ms. Roane until June 6, 2002. The fact that she waited so long to pursue these claims would militate against any equitable relief, were it available.

Therefore, Ms. Roane's claims of discrimination and retaliation under 42 U.S.C. § 1981 against NCC is time-barred and must be dismissed with prejudice. Similarly, Ms. Roane's claim of conspiracy under 42 U.S.C. § 1985 against all NCC Defendants is time-barred and must also be dismissed with prejudice.

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CONCLUSION

Defendants' Motions for Dismissal shall be GRANTED, and plaintiff's Motion for Summary Judgment shall be DENIED. A separate order shall issue this date.

Date: 4-1-03

s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 02-1125 (RCL)

JEAN BENNETT ROANE,

Plaintiff

v.

NATIONAL CHILDREN'S CENTER, INC., ET AL.,

Defendants

ORDER AND JUDGMENT

For the reasons stated in an accompanying Memorandum Opinion, it is hereby

ORDERED that plaintiff's Motion for Summary Judgment is DENIED. It is further

ORDERED that defendants' Motions to Dismiss are GRANTED.

Judgment is hereby entered for defendants, dismissing this case with prejudice.

SO ORDERED.

Date: 4-1-03

s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND FILED MARCH 27, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No: 99-03390 (RCL)

JEAN BENNETT ROANE

Plaintiff,

v.

NATIONAL. CHILDREN'S CENTER, et al.

Defendants.

ORDER

UPON CONSIDERATION of the Motion for Clarification and Amendment of the Court's March 29, 2001 Order and Memorandum Opinion and any opposition thereto, it is hereby

ORDERED that the Motion is GRANTED and it is further

ORDERED that the Court's Order and Memorandum Opinion are hereby amended to reflect that Plaintiff's 42 U.S.C. § 1981 claim stands dismissed without prejudice with respect to NCC, and it is further

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ORDERED that the Court's Order dated March 29, 2001 is hereby amended to reflect that Plaintiff's 42 U.S.C. § 1985 claim stands dismissed without prejudice with respect to all NCC Defendants.

s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

Date: 3-27-02

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT FILED OCTOBER 15, 2001

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 01-7072

September Term, 2001
00cv00436
99cv03390

Jean Bennett Roane,

Appellant

v.

National Children's Center, Inc., et al.,

Appellees

BEFORE: Rogers and Tatel, Circuit Judges;
Williams, Senior Circuit Judge

ORDER

Upon consideration of the motion to dismiss or in the alternative for summary affirmance, and the opposition thereto; the motions for summary affirmance, and the opposition thereto; and this court's order to show cause filed July 12, 2001, and the response thereto, it is

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ORDERED that this court's order to show cause be discharged. It is

FURTHER ORDERED that the motion to dismiss be granted. The district court did not resolve all claims against all parties in these consolidated cases and did not issue a certification pursuant to Rule 54(b). *See* Fed. R. Civ. P. 54(b); *Building Indus. Ass'n v. Babbitt*, 161 F.3d 740, 742-43 (D.C. Cir. 1998); *Phillips v. Heine*, 984 F.2d 489, 490 (D.C. Cir. 1993). The district court's opinion and order indicate that it did not dispose of the 42 U.S.C. § 1981 claim against the National Children's Center. It is

FURTHER ORDERED that the motions for summary affirmance be dismissed as moot.

* * *

Per Curiam
s/ [illegible]

APPENDIX E — MEMORANDUM OPINION, JUDGMENT, AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND FILED MARCH 29, 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Nos: 99-03390 (RCL)
00-00436

JEAN BENNETT ROANE,

Plaintiff,

v.

NATIONAL CHILDREN'S CENTER, INC., et al.

Defendants.

MEMORANDUM OPINION

Plaintiff Jean Bennett Roane filed two law suits against numerous defendants alleging violations of Title VII (42 U.S.C. § 2000e et seq.), 42 U.S.C. § 1983, 42 U.S.C. § 1985 and slander per se. The defendants have moved on various grounds to dismiss each case. The Court GRANTS and DENIES these motions as explained below.

I Background

In the fall of 1998, the National Children's Center ("NCC") was in the midst of a union organizing campaign. The company, wanting to resist the union, hired Alpha

Associates, Inc. ("Alpha") to resist the union. The plaintiff, Ms. Roane, was, at that time, an independent contractor with Alpha and worked with the NCC in that capacity.

After the union organizing campaign ended, Ms. Roane applied for further employment with the NCC. The NCC alleges that two weeks after she submitted her application, and the NCC had not yet responded, Ms. Roane "subjected both NCC and its employees, including its counsel, to personal visits, letters, telephone calls, and even leaflets." Defendants' Motion to Dismiss, Or, Alternatively, To Consolidate at 2. The NCC sought a Temporary Restraining Order (TRO) against Ms. Roane on February 25, 1999. The request for a TRO was denied.

Ms. Roane filed a complaint with the EEOC on March 29, 1999 alleging that she had been discriminated against on the basis of race by the NCC. *See* Defendant H. Alan Young and Young, Goldman & Van Beek's Motion to Dismiss, Ex. 3. The EEOC issued a right-to-sue letter on September 9, 1999. *See* December 20, 1999 Complaint (1999 Complaint), Ex. 1. On December 20, 1999, 102 days after the right-to-sue letter was issued. Roane filed suit, alleging violations of her rights under Title VII and § 1981. See 1999 Complaint.

There are four sets of defendants named in this suit. The first set is comprised of defendants affiliated with the NCC: the NCC itself, the Board of Directors of the NCC, Executive Director Arthur Ginsburg, and Chief Program Officer Dale Dangremond (NCC defendants). The second set is made up of Alpha Associates, the President of Alpha Associates Nicholas T. Sangalis, and John Mitchell (Alpha

defendants), who were supervisors and employers of Ms. Roane when she worked at Alpha. Third, the law firm of Arter & Hadden, David Shaffer, and Karen Esser (Arter & Hadden defendants), who represented the NCC during the union organizing campaign and in the TRO hearing. Finally, Ms. Roane also named H. Alan Young a defendant. Mr. Young is with the law firm of Young, Goidman & Van Beek and has served as general counsel to the NCC on a contract basis.

On March 2, 2000, Ms. Roane filed another action against the NCC defendants, the Arter & Hadden defendants, Mr. Young, and his law firm Young, Goidman, & Van Beek. *See* March 2, 2000 Complaint (2000 Complaint). The Alpha defendants were not named in the second suit. The second suit alleged that Roane was defamed by an attorney with Arter & Young during the hearing on the TRO on February 25, 1999. Further, Roane alleged that she was slandered by statements made by two of the NCC defendants, Dale Dangremond and Arthur Ginsburg, at the NCC to the effect that "Ms. Roane is crazy." 2000 Complaint ¶ 13-14.

II Motion to Consolidate

The Arter & Hadden defendants have filed a motion to consolidate the two actions. While the plaintiff has objected to having two distinct trials on these matters, she has not voiced an objection to consolidating the matters for pre-trial consideration.[1] *See* Plaintiffs Status Memorandum filed

1. Further, there is evidence that Ms. Roane believes these actions are indistinguishable. For example, she filed an Addendum in Support of Complaint Filed in Above Captioned Case, which (Cont'd)

Oct. 11, 2000 at 20. Because the factual backgrounds of both cases are identical and the motion to consolidate the actions, at least with respect to pre-trial issues, is unopposed, the Court grants the motion to consolidate.

III Title VII Claims

The defendants have moved to dismiss the plaintiffs Title VII claims for a number reasons.

A. Motion to Dismiss the Title VII Claim

Ms. Roane's right-to-sue letter was issued by the EEOC on September 9, 1999. 1999 Complaint Ex. 1. She filed a complaint in this action on December 20, 1999, 102 days after the right-to-sue letter was issued. *Id.* Defendants argue that plaintiff failed to state a claim on her Title VII action because she failed to file suit within 90 days of the receipt of her right-to-sue letter. *See* Memorandum in Support of Defendants' Motion to Quash Service, or in the Alternative, to Dismiss at 7-8. In response, plaintiff contends that:

(Cont'd)
responds to the defendants' argument that her Title VII claim is time-barred. The substance of this filing relates to the suit initiated by her 1999 Complaint, but the case number on the filing is the case number for the suit initiated by her 2000 Complaint.

In addition, in a number of filings for the case initiated by the 2000 Complaint she makes a number of arguments solely applicable to the arguments at issue in her 1999 Complaint. *See* e.g., Status Memorandum filed Oct. 11, 2000 at 19; Status Memorandum filed June 27, 2000 at 1-2: Addendum in Support of Complaint Filed in Above Captioned Case at 1-2.

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> "Counsel cites *Taye v. Amundson*, 908 F.Supp. 21, 22 (D.D.C. 1995) for the astounding proposition and extraordinary sanction that Plaintiffs complaint be dismissed because it is time-barred. The facts are as follows: Mr. Taye is a former parking lot attendant at a University [sic] who brought a pro se Title VII complaint against his former supervisor. He filed his claim ***SEVEN MONTHS*** after he received a Right-To-Sue Letter. Further discussion of this case is unnecessary."

Plaintiffs Supplemental Filings Page I (emphasis in the original).

Contrary to Ms. Roane's suggestion, further discussion of Taye is quite instructive. Taye's complaint was dismissed for the sole reason that, having been filed several months late, it was time-barred. While the Court acknowledged that in some cases it is appropriate to presume that the right-to-sue letter took 3 days to arrive at a plaintiffs home, and so a '93 day rule' may sometimes be appropriate where the plaintiff suggests that she didn't receive the letter on the date of issuance, any time beyond that '93 day rule' is not justifiable. *See Taye*, 908 F. Supp. at 23. "Although the Court will hold a pro se plaintiff's complaint to a standard less stringent than pleadings drafted by attorneys, the Court cannot overlook legal requirements." *Id.* (citations omitted).

Ms. Roane contends that she misunderstood the mechanics of fling in the District Court for the District of Columbia. *See* Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 19. *See also*, Addendum in Support of Complaint Filed in Above Captioned Case,

Ex. I at ¶ 13. She alleges that an unnamed employee of the Clerk's office made some remarks which led her to believe that she only had to have the complaint *postmarked* on the ninetieth day. *Id.* For that reason, she argues that she should not be held to the requirement that the complaint be filed within ninety days of receiving her right-to-sue letter, as required by 42 U.S.C. § 2000e5(f)(1)(a). The Court rejects this argument. As the Supreme Court noted, "[procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984) (per curium). The Court finds that Ms. Roane's complaint is time-barred.

B Title VII Claim Against Alpha Associates and Arter & Hadden

Alpha Associates and Arter & Hadden argue that they are not 'employers' under Title VII for the purposes of this action and, for that reason, the Title VII claim against them should be dismissed.[2] *See* Memorandum of Points and

2. The law firm Young, Goldman & Van Beek argues that the Title VII claims against it should be dismissed for these reasons as well. However, it appears that Young Goldman & Van Beek is not a party before the Court. As explained below, Ms. Roane filed the 1999 Complaint with the Court which did not contain Young Goldman & Van Beek as a defendant. *Infra* Part VI A. She then served Young Goldman & Van Beek with a separate "complaint" which did name them as a defendant. So, contrary to the beliefs of Ms. Roane and Young, Goldman & Van Beek, the firm is not a defendant. For that

(Cont'd)

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Authorities In Support of Motion to Dismiss of [Alpha] Defendants at 10; Memorandum of Law in Support of [Arter & Hadden]'s Motion to Dismiss at 2.

Arter & Hadden argues that it is not an employer for the purposes of Title VII. Arter & Hadden's only involvement in this suit is through the representation they provided to NCC during a union organizing campaign and a referral of Alpha Associates to the NCC. *See* 1999 Complaint at ¶ B. The Court holds that Arter & Hadden has not been alleged to have had an "employer" relationship with Ms. Roane within the meaning of the term in Title VII. 42 U.S.C. § 2000e(f) ("The term 'employee' means an individual employed by an employer . . .").

Alpha asserts that it is not an employer for the purposes of Title VII because it has fewer than fifteen employees. Memorandum of Points and Authorities In Support of Motion to Dismiss of [Alpha] Defendants Ex. C at ¶ 3. Title VII only applies to organizations with more than 15 employees. 42 U.S.C. § 2000e(b). The court holds that since Alpha does not have 15 employees or more, it is not subject to Title VII.

Further, neither Alpha nor Arter & Hadden were mentioned in Ms. Roane's EEOC complaint. A plaintiff can

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(Cont'd)
reason, while the Court finds a number of Young, Goldman & Van Beek's arguments to have substantial merit, the Court is unable to consider them with respect to the case initiated by the 1999 Complaint.

However, it appears that the firm is a party to the case initiated by the 2000 Complaint.

only initiate a Title VII action after exhausting administrative remedies, and then can only initiate an action "against the respondent named in the charge." 42 U.S.C. § 2000e-5(f)(1). The only respondent named in Ms. Roane's EEOC complaint is the NCC. See Memorandum of Points and Authorities In Support of Motion to Dismiss of [Alpha] Defendants Ex. E. For that reason, Ms. Roane could only initiate a Title VII action against the NCC, if it was not time-barred.

C Title VII Claim Against Individuals

The individual defendants in this action argue that the Title VII claims with respect to them should be dismissed because Title VII does not apply to individuals. *See* Memorandum of Points and Authorities in Support of Motion to Dismiss of [Alpha] Defendants at 10; Memorandum of Law in Support of [Shaffer and Esser]'s Motion to Dismiss at 5. The Court agrees. Title VII claims cannot be asserted against individuals. *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir. 1995) ("while a supervisory employee may be joined as a party defendant in a Title VII action, that employee must be viewed as being sued in his capacity as the agent of the employer, who is alone liable for a violation of Title VII"). Further, Ms. Roane did not name any of the individual defendants in this action in her EEOC complaint. *See supra* Part III B.

For all of the above reasons, the Court grants the defendants' motions to dismiss the Title VII claims with prejudice.

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IV § 1981 Claims

Ms. Roane has alleged that all of the defendants violated her rights to contract under 42 U.S.C. § 1981. Since this arises in the context of a motion to dismiss, the relevant inquiry is whether the facts alleged in Ms. Roane's complaint, if true, would be sufficient to establish her claim. *Sparrow v. United Airlines, Inc.*, 216 F.3d 1111,1115 (D.C. Cir. 2000).

The charges in Ms. Roane's complaint are relatively thin. She alleges that she was denied an opportunity to be a consultant with the NCC because of her race. *See* 1999 Complaint ¶1. She does not elaborate on this charge.[3] For this reason, the Court considers the defendants in three broad classes, the NCC itself, the board of directors and employees of the NCC, including Mr. Young, and the other defendants without a direct connection to the NCC.

Ms. Roane has stated a claim against the NCC. She has alleged that "she was unlawfully discriminated against based on her race" when "she applied for a potential position with NCC" and it was given to someone else. 1999 Complaint ¶ 1. "I was turned down for a job because of my race' is all a complaint has to say to survive a motion to dismiss under Rule 12(b)(6)" in a § 1981 action. *Sparrow*, 216 F.3d at 1115 (D.C. Cir. 2000) (quoting *Bennett v. Schmidt.* 153 F.3d 516, 518 (7th Cir. 1998)). Ms. Roane has stated a § 1981 claim against the NCC.

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3. Ms. Roane does incorporate by reference the allegations in her Memorandum of Law filed with the EEOC. 1999 Complaint B 2. However, she does not attach that Memorandum of Law, and the Court has no record of it having been filed.

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Ms. Roane has not alleged in the pleadings that the other NCC defendants or Mr. Young have any individual involvement in any employment decision which would be necessary to sustain a § 1981 claim. Officers and employees of a corporation may be liable under § 1981 if they intentionally cause an infringement of rights protected by the section. *Richard v. Bell Atlantic*, 946 F. Supp. 54, 74 (D.D.C. 1996). However, Ms. Roane has not alleged that the individual NCC defendants intentionally infringed on her rights. The Court in *Richard* confronted the same pleading problem in a § 1981 action, and dismissed the claims against the individual defendants without prejudice. *Id.* The Court finds the approach of the *Richard* Court instructive. Therefore, the § 1981 claims against the individual NCC defendants are dismissed without prejudice.

Finally, the Court dismisses with prejudice the § 1981 claim against the last category of defendants. These defendants are the Alpha defendants and the Arter & Hadden defendants. Alpha was Ms. Roane's previous employer. The individual Alpha defendants are employees of Alpha. Arter & Hadden was a firm representing the NCC, and the individual Arter & Hadden defendants were attorneys representing the NCC. None of these relationships gives any indication how these defendants played an actionable role in NCC's alleged discrimination against Ms. Roane. While claiming that "I was fired because of my race" states a claim in a suit against an employer, it simply is not enough in a suit against a third party where there is not even a suggestion of the facts which may give rise to the claim. To hold otherwise would violate Rule 8(a)'s requirement that the complaint contain a "plain statement of the claim." Therefore,

the § 1981 claims against the Alpha defendants and the Arter & Hadden defendants are dismissed with prejudice.

V § 1985 Claims

Ms. Roane alleges in an amendment to her 1999 Complaint that the defendants violated 42 U.S.C. § 1985.[4] *See* Amended Pleadings at 2. § 1985 does not confer any substantive rights; rather, it allows a person to sue if others have conspired to abridge other substantive civil rights of an individual. 42 U.S.C. § 1985(3). *See also Great American Federal Savings & Loan Ass'n v. Novotnv*, 442 U.S. 366, 372 (1979). Title VII does not grant substantive rights the abridgement of which can give rise to a § 1985 action. *Novotnv*, 442 U.S. at 378. Therefore, the only claim which can give rise to the § 1985 action is her § 1981 claim.

As is discussed above, Ms. Roane's § 1981 claims against every defendant but the NCC itself are dismissed for failure to state a claim. *Supra* Part IV. Her § 1985 claims against every defendant but the NCC itself are accordingly also dismissed.[5] *See e.g.*, *Wesley* v. *Howard Univ.*, 3 F. Supp. 2d 1, 3 (D.D.C. 1998). The only remaining issue is her § 1985 claim with respect to the NCC itself.

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4. While there is some dispute as to whether the Amended Complaint is properly before the Court, the Court will consider the additional claim raised there. This will not be unduly prejudicial because the parties have had an opportunity to fully brief the issues raised in the Amended Complaint and the issues are very closely related to the claims in the 1999 Complaint.

5. Since the § 1981 claims against the individual NCC defendants were dismissed without prejudice, the § 1985 claims are similarly dismissed without prejudice.

Since the § 1985 claim is a conspiracy cause of action, it requires the participation of more than one actor. 42 U.S.C. § 1985(3) ("*If two or more persons* . . . conspire . . . for the purpose of depriving . . . any person . . . of the equal protection of the laws . . .") (emphasis added); *see also Eraser v. Palm Springs General Hospital.* 657 F. Supp. 739, 741 (S.D. Fla. 1986) (a § 1985 action requires more than one actor to survive a motion to dismiss). Since there is only one remaining actor, the NCC, there cannot be a conspiracy. For that reason, the § 1985 claim against NCC is dismissed without prejudice.

V Defamation Claims

In her 2000 Complaint, Ms. Roane asserted that Ms. Esser defamed her when he made a number of remarks about Roane's mental health at the TRO hearing, Roane has also sued the NCC members of the NCC's board of directors, and two employees of the NCC for defamation. The theory of liability for these additional defendants is not clearly articulated in Ms. Roane's complaint; she does assert that a statement that "Ms. Roane is crazy" was circulating throughout the NCC by unnamed individuals.[6] *See* 2000 Complaint ¶ 12-13.

With respect to the first theory of defamation, there can be no liability for defamation by the remarks of counsel in a court proceeding. Perhaps most instructive on this point is *Ameia v. Gidar*, 541 A.2d 621 (D.C. 1988). In *Arneja*, an

6. The Court finds that, after granting the motion to consolidate, it has jurisdiction over the state law defamation claims under 29 U.S.C. § 1367.

attorney told opposing counsel, in front of their clients, while waiting for a hearing to begin: "You're unnecessarily pursuing this case. You don't understand the law. Where did you go to law school; you should go back to law school before you practice law. You don't understand. You better learn your English, go to elementary school." *Arneja*, 541 A.2d at 622. The D.C. Court of Appeals found that because the statements dealt with the attorney's comprehension of English, they were sufficiently related to the issues of statutory interpretation being adjudicated to be covered by an absolute privilege against a defamation action. *Arneja*, 541 A.2d at 623. In this case the relation is even more straightforward. Counsel was trying to persuade the Court of the need for a TRO. Representations about Roane's mental competence were unquestionably related to that task. Counsel has an absolute privilege to make those remarks at the TRO hearing.

Turning to the second theory of defamation, the statements that she is 'crazy' do not rise to the level necessary to make a claim for slander per se. "Slander 'per se' defines the limited group of slanders actionable without proof of pecuniary damage." *Afro-American Publishing Company v. Jaffee*, 366 F.2d 649, 660 n.31 (D.C. Cir. 1966). "To be so actionable, spoken words must 'import a charge that the party has been guilty of a criminal offense involving moral turpitude, or that the party is infected with a contagious distemper,' or they must be 'prejudicial in a pecuniary sense to a person in office or to a person engaged as a livelihood in a profession or trade.'" *Meyerson* v. *Huribut* 98 F.2d 232, 233 (D.C. Cir. 1938) quoting *Pollard v. Lyon*, 91 U.S. 225, 227 (1875). *See also Harmon v. Liss*, 116 A.2d 693, 695 (D.C. 1955) ("words spoken of another must, in order to be

actionable per se, impute to him (plaintiff) the commission of some criminal offense for which he may be indicted and punished, if the charge involves moral turpitude and is such as will injuriously affect his social standing', or . . . the question is whether, from the language attributed to defendant, there is something from which the commission of a crime involving moral turpitude can be inferred."). The assertion that Ms. Roane is crazy does not rise to this level. *See e.g., Shipe v. Schenk*, 158 A.2d 910, 911 (D.C. 1960) (calling the plaintiff a "damn liar" and a "dead beat" was not per se slander). Therefore the Court dismisses the slander per se claim with prejudice.[7]

VI Service of Process Problems

Aside from the grounds for dismissal already covered by the Court, the plaintiff's suit suffers from a variety of service problems. Although the Court stands by the dismissals explained above, it nonetheless addresses the service issues as an alternate ground for dismissal. For the reasons stated below, the Court finds the plaintiffs service defects to merit the dismissal of several actions.

A Problems With Service Of The 1999 Complaint

There are four problems with the service of process of the 1999 Complaint. First, Ms. Roane did not serve the same document that she filed with the clerk's office. Second, Ms.

7. Ms. Roane has filed a motion for leave to amend the 2000 Complaint to add the Alpha defendants under a civil conspiracy theory based on the defamation claim. Because the defamation claim will be dismissed with prejudice, the motion for leave to amend the 2000 Complaint is denied as futile.

Roane, as a party to this matter, is not allowed to serve the complaint and summons herself. Third, service was untimely. Finally, the 1999 Complaint and summons were served on individuals not authorized to accept service of process.

First, defendants were served with a copy of the summons and a document titled "Complaint" which was different in several regards from the complaint filed with the Clerk's office initiating this lawsuit.[8] Defendants' Memorandum in Support of Motion to Quash Service at 4; Supplemental Memorandum of Law In Support of Defendants' Motion to Dismiss at 1-2. Astonishingly, the Court is unable to find any case law that specifically requires that the same document filed with the Clerk's office be served in order to satisfy the requirements of Rule 4. To fill this gap, the Court holds that, for the purposes of Rule 4, "complaint" means the complaint filed with the Clerk's office. For that reason, the Court finds that the defendants were never served with a copy of the complaint in this case.

Second, Ms. Roane is not able to serve the complaint and summons herself because she is a party to this action. Fed. R. Civ. Pro. 4(c). Ms. Roane sent the copies of the summons and complaint via certified mail herself. Rule 4(c)

8. For example, in the 1999 Complaint filed with this Court, Young, Goldman & Van Beek is not named as a defendant in the caption. In the "Complaint" sent out with the summons, the firm is named in the caption. *Compare* Defendants' Motion to Quash Service of Process Or in the Alternative, to Dismiss for Failure to State a Claim Ex. A; *with id.* Ex. B. Aside from the fact that the two documents use completely different typefaces, the "Complaint" is generally more detailed about the nature of the parties and their relationships. *See, e.g. id.* at ¶ A, at ¶ B.

is clear: "[s]ervice may be effected by any person who is not a party . . ." Ms. Roane's service was improper because she served the summons and complaint herself.

Third, the service of process of the "complaint" was untimely. Rule 4(m) requires that the complaint and summons be served within 120 days of the date the complaint was filed in the clerk's office. The Complaint in this case was filed on December 20, 1999. The Alpha defendants were served with the "Complaint" on May 2, 2000, 133 days later. *See* Memorandum of Points and Authorities In Support of Motion to Dismiss Defendants Alpha Associates, Inc., Sangalis, and Mitchell at 3. Mr. Young was served on April 28, 2000, 128 days after the 1999 Complaint was filed. *See* Memorandum of Points and Authorities In Support of [Young] Defendants' Motion To Dismiss Ex. 4. Arter & Hadden states they were never served with a copy of the "Complaint", only with a copy of the Amended Complaint on May 1, 2000, 132 days after the "Complaint" was filed. *See* Reply Memorandum Of Defendants Arter & Hadden, Ex. C. Absent a motion for an extension of time to effect service of process, this clearly violates Rule 4(m).

Fourth, while service of process can be effective in the District of Columbia if made by certified mail, several of the defendants were not properly served in this manner. Service of process is effective if it is made pursuant to "the law of the state in which the district court is located." Fed. R. Civ. Pro. 4(e)(1). The D.C. Rules allow for service by certified mail. D.C. R. Civ. Pro. 4(c)(3). Proof of the effectiveness of service by certified mail is governed by local rule 4(k) which requires that, among other things, the plaintiff

show that "if the return receipt does not purport to be signed by the party named in the summons, then specific facts from which the Court can determine that the person who signed the receipt meets the appropriate qualifications for receipt of process set out in subdivisions (e) through (j) of this Rule" must be demonstrated. The only possibly relevant categories of person described in (e) through (j) of local rule 4 are (1) agents authorized to receive service of process or (2) individuals residing at a person's "dwelling house of usual place of abode" of "suitable age and discretion." D.C. R. Civ. Pro. 4(e)(2).

Ms. Roane delivered an envelope to the NCC offices which was received by Michelle Smith Byers, the Executive Assistant to the Executive Director. Defendant Arthur Ginsburg. *See* Memorandum in Support of [NCC] Defendants' Motion to Quash Service, Ex. F; Ex. G ¶ 2. Ms. Byers is not authorized to receive service of process. *Id.* The secretary of Mr. Young, who had no authority to receive service of process, was served with a copy of the summons and complaint for Mr. Young. See Memorandum of Points and Authorities in Support of [Young] Defendants' Motion to Dismiss at 4-5. Since the requirements for service via certified mail were not met, these defendants did not receive sufficient service of process under the local rules.

For these reasons, the Court grants the defendants' motions to dismiss the case initiated by the 1999 Complaint for improper service of process.

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B Problems with the 2000 Complaint.

There are a number of problems with the service of process of the 2000 Complaint as well. First, service of process was not timely. Ms. Roane attempted to serve the complaint and summons on the NCC defendants on July 3, 2000. *See* Memorandum of Points and Authorities In Support of [NCC] Defendants' Motion to Dismiss Plaintiffs Complaint at 4. She filed the 2000 Complaint on March 1, 2000. *Id.* 123 days had elapsed between the date when she filed the 2000 Complaint and the date when she attempted to serve it. *Id.* Ms. Roane attempted to serve the Arter & Hadden defendants on July 5, 2000, 125 days after she filed the 2000 Complaint. See Memorandum of Law in Support of [Arter & Hadden] Defendants' Motion to Dismiss at 8. This is plainly in violation of Federal Rule of Civil Procedure 4(m).

Ms. Roane attempted to serve the NCC defendants by mailing an envelope by certified mail to the NCC headquarters. *See* Memorandum of Points and Authorities In Support of [NCC] Defendants' Motion To Dismiss Plaintiffs Complaint Ex. C; Ex. D. The envelope was received by Ms. Queen, an employee of NCC who is not authorized to accept service on behalf of the NCC or any of the individual NCC defendants. *See id.* That envelope contained a number of smaller envelopes addressed to the individual NCC defendants. *See id.* Within the envelope addressed to Mr. Ginsburg was a copy of the 2000 Complaint and corresponding summons. *See id.*

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While the local rule does allow service of process by certified mail, this means of service is not acceptable. First, this kind of "Russian Doll" service of process, of envelopes within envelopes, is not recognized by the Federal Rules. Second, even if it were, somehow, acceptable, Ms. Queen is not an agent for accepting service of process for any of the defendants attempting to be served in this fashion. *See* Part VI B *supra.*

The service on the Arter & Hadden defendants is similarly defective. Ms. Roane mailed a copy of the 2000 Complaint and accompanying summons via certified mail to Thelen Reid & Priest, the current employer of defendants Esser and Shaffer. *See* Memorandum of Law In Support of Defendants' Motion to Dismiss, Ex. B. The copy of the summons and complaint was signed for by the mail clerk at Thelen Reid & Priest. *See id.* The mail room clerk was not authorized to receive service of process for any of the Arter & Hadden Defendants. *See id.*

In addition, as discussed with respect to the service of process of the 1999 Complaint, Ms. Roane attempted to serve the complaint herself, which is not proper under Rule 4(c). *See supra* Part VI A.

For the foregoing reasons, the defendants' motions to dismiss the suit initiated by the 2000 Complaint for improper service of process is granted.

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VII Conclusion

To summarize the Court's holding today, the Court dismisses all of the plaintiff's claims except one: her § 1981 claim against NCC. Of the claims dismissed, the great majority are dismissed with prejudice; the only claims dismissed without prejudice are the plaintiff's § 1981 claims against Ginsburg, Dangremond, and Goldberg, and the plaintiff's § 1985 claims against NCC, Ginsburg, Dangremond, and Goldberg. A separate order consistent with this Opinion shall issue this date.

Date: 3-29-01

s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

Appendix E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Nos: 99-03390 (RCL)
00-00436

JEAN BENNETT ROANE,

Plaintiff,

v.

NATIONAL CHILDREN'S CENTER, INC., et al.

Defendants.

JUDGMENT

Consistent with the Memorandum Opinion issued this date, judgment is hereby entered in favor of defendants ALPHA ASSOCIATES, ARTER & HADDEN, YOUNG, GOLDMAN, & VANBEEK, H. ALAN YOUNG, DAVID SHAFFER, ESQ., KAREN R. ESSER, ESQ., NICHOLAS T. SANGALIS, and JOHN MITCHELL.

The plaintiff's suit against these defendants stands DISMISSED WITH PREJUDICE.

SO ORDERED.

Date: 3-29-01

s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

Appendix E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Nos: 99-03390 (RCL)
00-00436

JEAN BENNETT ROANE,

Plaintiff,

v.

NATIONAL CHILDREN'S CENTER, INC., et al.

Defendants.

ORDER

Consistent with the Memorandum Opinion issued this date, it is hereby

ORDERED that defendant Esser's motion to consolidate Civ A. No. 99-3390 (RCL) and Civ. A. No. 00- 436 (RCL) [4-2] is GRANTED; further, it is

ORDERED that the motions to dismiss Civ. A. No. 99-3390 filed by defendant Esser [5-1], defendant Dangremond [6-2], defendant Young [9-1], defendant Arter & Hadden [10-1] and defendant Alpha Associates [22-1] are GRANTED; further it is

ORDERED that the motions to dismiss Civ. A. No. 00-436 filed by defendant Esser [4-1] and defendant Dangremond [5-1] are GRANTED;

ORDERED that the plaintiff's motion to extend time to respond to respond to defendants' motions to dismiss [6-1] is GRANTED nun pro tunc; further, it is

ORDERED that defendant Esser's motion to substitute counsel [36-1] is GRANTED nunc pro tunc; further, it is

ORDERED that the plaintiff's motion for an oral hearing [39-2] is DENIED; further, it is

ORDERED that plaintiff's motion for leave to file an amended complaint [9-1] is DENIED; further, it is

ORDERED that defendant Dangremond's motion to quash service of process [6-1] is DENIED AS MOOT.

The plaintiff's Title VII claim stands DISMISSED WITH PREJUDICE with respect to all defendants.

The plaintiff's defamation claim stands DISMISSED WITH PREJUDICE with respect to all defendants.

The plaintiff's 42 U.S.C. § 1981 claim stands DISMISSED WITH PREJUDICE with respect to ALPHA ASSOCIATES, ARTER & HADDEN, H. ALAN YOUNG, DAVID SHAFFER, ESQ., KAREN R. ESSER, ESQ., NICHOLAS T. SANGALIS, and JOHN MITCHELL. The plaintiff's 42 U.S.C. § 1981 claim stands DISMISSED WITHOUT PREJUDICE with respect to ROBERT GOLDBERG, ARTHUR GINSBERG, and DALE DANGREMOND.

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The plaintiff's 42 U.S.C. § 1985 claim stands DISMISSED WITH PREJUDICE with respect to ALPHA ASSOCIATES, ARTER & HADDEN, H. ALAN YOUNG, DAVID SHAFFER, ESQ., KAREN R. ESSER, ESQ., NICHOLAS T. SANGALIS, and JOHN MITCHELL. The plaintiff's 42 U.S.C. § 1981 claim stands DISMISSED WITHOUT PREJUDICE with respect to the NATIONAL CHILDREN'S CENTER, ROBERT GOLDBERG, ARTHUR GINSBERG, and DALE DANGREMOND.

SO ORDERED.

Date: 3-29-01

s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge